

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

EFFRIN G., Plaintiff, v. NANCY A. BERRYHILL, Acting Commissioner of Social Security Administration, Defendant. } Case No. CV 17-3714-SP } MEMORANDUM OPINION AND ORDER }

L.

INTRODUCTION

On May 17, 2017, plaintiff Effrin G. filed a complaint against defendant, the Commissioner of the Social Security Administration (“Commissioner”), seeking review of a denial of a period of disability, disability insurance benefits (“DIB”), and supplemental security income (“SSI”). The court deems the matter suitable for adjudication without oral argument.

Plaintiff presents three disputed issues for decision: (1) whether the Administrative Law Judge (“ALJ”) erred at step two; (2) whether the residual

1 functional capacity (“RFC”) determination was supported by substantial evidence;
2 and (3) whether the step five determination was supported by substantial evidence.
3 Memorandum in Support of Plaintiff’s Complaint (“P. Mem.”) at 1, 15-23; *see*
4 Defendant’s Memorandum in Support of Answer (“D. Mem.”) at 1-4.

5 Having carefully studied the parties’ memoranda, the Administrative Record
6 (“AR”), and the decision of the ALJ, the court concludes that, as detailed herein,
7 the ALJ’s step two finding, RFC determination, and step five finding were not
8 supported by substantial evidence. The court therefore remands this matter to the
9 Commissioner in accordance with the principles and instructions enunciated in this
10 Memorandum Opinion and Order.

11 **II.**

12 **FACTUAL AND PROCEDURAL BACKGROUND**

13 Plaintiff was fifty years old on August 31, 2012, the alleged disability onset
14 date. AR at 99. Plaintiff has a cosmetology certificate and has past relevant work
15 as a nurse aide, barber, and office clerk. *Id.* at 56, 88-89.

16 On October 3, 2013, plaintiff filed applications for a period of disability,
17 DIB, and SSI, alleging an onset date of August 31, 2012 due to post-traumatic
18 stress disorder (“PTSD”), back pain, a dislocated thumb, knee pain, and eye
19 problems.¹ *Id.* at 99, 108. The Commissioner denied plaintiff’s applications
20 initially, after which he filed a request for a hearing. *Id.* at 121-25, 127-28.

21 Plaintiff, represented by counsel, appeared and testified at hearing before the
22 ALJ on August 27, 2015. *Id.* at 41-98. The ALJ also heard testimony from Dr.
23 John Dusay, a medical expert, and Phillip Sidlow, a vocational expert. *Id.* at 46-
24 52, 87-96. On October 29, 2015, the ALJ denied plaintiff’s claims for benefits. *Id.*
25 at 22-36.

27 ¹ Plaintiff previously filed applications for SSI and DIB in 2007. AR at 100.
28 Both were denied at the initial level. *Id.*

1 Applying the well-known five-step sequential evaluation process, the ALJ
2 found, at step one, that plaintiff had not engaged in substantial gainful activity
3 since August 31, 2012, the alleged onset date. *Id.* at 24.

4 At step two, the ALJ first found that through the date last insured, December
5 31, 2012, plaintiff suffered from the following impairments: sebaceous cyst,
6 hypertension, diabetes mellitus, hyperlipidemia, and depression. *Id.* But the ALJ
7 determined these impairments were not severe because, through the date last
8 insured, these impairments did not significantly limit plaintiff for twelve
9 consecutive months. *Id.* Thus, for purposes of plaintiff's DIB application, the ALJ
10 determined plaintiff was not under a disability between the August 31, 2012 onset
11 date and the date last insured, December 31, 2012. *Id.* at 28.

12 The ALJ then returned to step two for purposes of plaintiff's SSI
13 application. The ALJ found that from the October 3, 2013 application date
14 onward, plaintiff suffered from the severe impairments of depression, PTSD,
15 adjustment disorder, and cannabis abuse. *Id.*

16 At step three, the ALJ found plaintiff's impairments, whether individually or
17 in combination, did not meet or medically equal one of the listed impairments set
18 forth in 20 C.F.R. part 404, Subpart P, Appendix 1. *Id.* at 29.

19 The ALJ then assessed plaintiff's residual functional capacity,² and
20 determined he had the RFC to perform a full range of work at all exertional levels,
21 but limited to: simple, routine tasks; frequent contact with supervisors, coworkers,
22 and the public; and simple work-related decisions. *Id.* at 31.

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24 ² Residual functional capacity is what a claimant can do despite existing
25 exertional and nonexertional limitations. *Cooper v. Sullivan*, 880 F.2d 1152, 1155-
26 56 n.5-7 (9th Cir. 1989). “Between steps three and four of the five-step evaluation,
27 the ALJ must proceed to an intermediate step in which the ALJ assesses the
28 claimant’s residual functional capacity.” *Massachi v. Astrue*, 486 F.3d 1149, 1151
n.2 (9th Cir. 2007).

The ALJ found, at step four, that plaintiff was unable to perform his past relevant work as a nurse aide, barber, or office clerk. *Id.* at 34.

At step five, the ALJ found that given plaintiff's age, education, work experience, and RFC, there were jobs that existed in significant numbers in the national economy that plaintiff could perform, including hospital cleaner, dishwasher, and dry cleaner helper. *Id.* at 35. Consequently, the ALJ concluded plaintiff did not suffer from a disability as defined by the Social Security Act. *Id.* at 36.

Plaintiff filed a timely request for review of the ALJ's decision, which was denied by the Appeals Council. *Id.* at 1-3. The ALJ's decision stands as the final decision of the Commissioner.

III.

STANDARD OF REVIEW

This court is empowered to review decisions by the Commissioner to deny benefits. 42 U.S.C. § 405(g). The findings and decision of the Social Security Administration must be upheld if they are free of legal error and supported by substantial evidence. *Mayes v. Massanari*, 276 F.3d 453, 458-59 (9th Cir. 2001) (as amended). But if the court determines that the ALJ's findings are based on legal error or are not supported by substantial evidence in the record, the court may reject the findings and set aside the decision to deny benefits. *Aukland v. Massanari*, 257 F.3d 1033, 1035 (9th Cir. 2001); *Tonapetyan v. Halter*, 242 F.3d 1144, 1147 (9th Cir. 2001).

“Substantial evidence is more than a mere scintilla, but less than a preponderance.” *Aukland*, 257 F.3d at 1035. Substantial evidence is such “relevant evidence which a reasonable person might accept as adequate to support a conclusion.” *Reddick v. Chater*, 157 F.3d 715, 720 (9th Cir. 1998); *Mayes*, 276 F.3d at 459. To determine whether substantial evidence supports the ALJ’s

1 finding, the reviewing court must review the administrative record as a whole,
2 “weighing both the evidence that supports and the evidence that detracts from the
3 ALJ’s conclusion.” *Mayes*, 276 F.3d at 459. The ALJ’s decision ““cannot be
4 affirmed simply by isolating a specific quantum of supporting evidence.””
5 *Aukland*, 257 F.3d at 1035 (quoting *Sousa v. Callahan*, 143 F.3d 1240, 1243 (9th
6 Cir. 1998)). If the evidence can reasonably support either affirming or reversing
7 the ALJ’s decision, the reviewing court ““may not substitute its judgment for that
8 of the ALJ.”” *Id.* (quoting *Matney v. Sullivan*, 981 F.2d 1016, 1018 (9th Cir.
9 1992)).

10 **IV.**

11 **DISCUSSION**

12 **A. Plaintiff Only Presents Issues Concerning the Denial of SSI**

13 In opposing each of plaintiff’s claims of error by the ALJ, the crux of
14 defendant’s argument is that the medical evidence presented by plaintiff concerns
15 impairments after the date last insured and thus is irrelevant. *See* D. Mem. at 1-4.
16 Defendant misconstrues the ALJ’s decision and the issues raised by plaintiff.

17 Plaintiff filed applications for both DIB and SSI. AR at 99, 108. To receive
18 DIB, a claimant must show he was disabled before the date last insured. *See*
19 *Armstrong v. Comm’r*, 160 F.3d 587, 589 (9th Cir. 1998) (citing 42 U.S.C.
20 § 423(c)). To receive SSI, a claimant must meet certain income requirements but
21 does not have to show he was disabled within a certain insured period. *See* 20 C.F.
22 R. § 416.202. Instead, “[g]enerally, in SSI cases, the claimant’s onset date and
23 application date will be the same” because a claimant is only entitled to SSI
24 benefits from the date of his application. *Cuadras v. Astrue*, 2011 WL 6936182, at
25 *8 n.7 (E.D. Cal. Dec. 30, 2011); *see Lopez v. Astrue*, 2010 WL 1328888, at *14
26 (E.D. Cal. Apr. 2, 2010) (“[B]ecause SSI payments are made beginning with the
27 date of application, the onset date in an SSI case is ordinarily established as of the
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1 date of filing, provided that the claimant was disabled on that date.”) (citing Soc.
2 Sec. Ruling (“SSR”)³ 83-20). However, there are cases where an onset date occurs
3 after the application date and SSI benefits should be awarded from the later onset
4 date. *See Cuadras*, 2011 WL 6936182, at *8 n.7.

5 Here, the ALJ correctly realized the medical evidence differed for the two
6 periods at issue. *See* AR at 24, 28. Consequently, as recounted above, the ALJ
7 cited different findings in his denial of the applications. Plaintiff does not raise
8 issues concerning the ALJ’s denial of his application for a period of disability and
9 DIB. *See* P. Mem. at 2, 15-23. Instead, plaintiff’s arguments concern only alleged
10 limitations subsequent to the application date. Accordingly, this court only
11 examines the denial of SSI benefits.

12 **B. The ALJ Erred at Step Two**

13 Plaintiff argues the ALJ erred at step two. P. Mem. at 15-18. Specifically,
14 plaintiff contends the ALJ failed to consider plaintiff’s osteoarthritis and occipital
15 neuralgia. *Id.*

16 At step two, the Commissioner considers the severity of the claimant’s
17 impairment. 20 C.F.R. § 416.920(a)(4)(ii).⁴ “[T]he step-two inquiry is a de
18 minimis screening device to dispose of groundless claims.” *Smolen v. Chater*, 80
19 F.3d 1273, 1290 (9th Cir. 1996) (citation omitted). “An impairment or
20 combination of impairments can be found ‘not severe’ only if the evidence

22 ³ “The Commissioner issues Social Security Rulings to clarify the Act’s
23 implementing regulations and the agency’s policies. SSRs are binding on all
24 components of the SSA. SSRs do not have the force of law. However, because
25 they represent the Commissioner’s interpretation of the agency’s regulations, we
26 give them some deference. We will not defer to SSRs if they are inconsistent with
the statute or regulations.” *Holohan v. Massanari*, 246 F.3d 1195, 1203 n.1 (9th
Cir. 2001) (internal citations omitted).

27 ⁴ All citations to the Code of Federal Regulations refer to regulations
28 applicable to claims filed before March 27, 2017.

1 establishes a slight abnormality that has ‘no more than a minimal effect on an
2 individual’s ability to work.’” *Id.* (citations omitted).

3 Here, the ALJ noted plaintiff suffered from a number of physical
4 impairments since the application date, including vision issues, diabetes mellitus,
5 lumbar strain, acromioclavicular arthritis, and chronic headaches, but there were
6 findings of only mild symptoms and the March 2014 consultative examination
7 found no physical limitations. AR at 28. The ALJ found that plaintiff started to
8 experience left shoulder pain in June 2014 and imaging showed that he suffered
9 from mild acromioclavicular osteoarthritis. *Id.* at 29. Although plaintiff had pain
10 and limited range of motion, he denied weakness and flexion was within normal
11 limits. *Id.* The ALJ found that plaintiff’s shoulder pain and range of motion
12 improved after he received a corticosteroid injection. *Id.* The ALJ also found
13 suggestions of exaggeration. *Id.*.. The ALJ additionally noted plaintiff was
14 diagnosed with occipital neuralgia in August 2014, but the pain improved for four
15 months after an occipital nerve block. *Id.* Despite these findings, the ALJ found at
16 step two plaintiff had no severe physical impairments.⁵ *Id.* at 28.

17 The mere diagnosis of an impairment does not establish that it was severe.
18 *See Verduzco v. Apfel*, 188 F.3d 1087, 1089 (9th Cir. 1999) (“Although the
19 [claimant] clearly does suffer from diabetes, high blood pressure, and arthritis,
20 there is no evidence to support his claim that those impairments are ‘severe.’”); *see*
21 *also Matthews v. Shalala*, 10 F.3d 678, 680 (9th Cir.1993) (“The mere existence of
22 an impairment is insufficient proof of a disability.”). But here, plaintiff was not
23 merely diagnosed with impairments.

24 With regard to plaintiff’s left shoulder pain, based on plaintiff’s history,
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26 ⁵ The ALJ did not receive all of the medical records concerning the shoulder
27 pain until after the hearing. *See* AR at 76. Consequently, the medical expert – who
28 in any event was a psychiatrist, and stated he was “not commenting on” physical
limitations (*see id.* at 47, 50) – did not review those records.

1 examinations, and imaging, physicians diagnosed plaintiff with acromiovacular
2 and glenohumeral osteoarthritis. AR at 1048, 1234. Upon examination, plaintiff
3 exhibited pain and decreased range of motion. *See, e.g., id.* at 1106, 1122, 1129.
4 Physicians treated the left shoulder pain with corticosteroid injections, which only
5 provided three days of relief. *See id.* at 1105, 1228, 1234.

6 As for plaintiff's headaches, physicians diagnosed plaintiff with chronic
7 headaches in October 2013. *Id.* at 631. Plaintiff continued to complain of
8 headaches that would last three to four hours a day on a daily or every other day
9 basis. *See, e.g., id.* at 659, 1122, 1129, 1168, 1380. Plaintiff received an occipital
10 nerve block in August 2014, which resulted in a 75% improvement in pain,
11 tension, and headaches. *Id.* at 1120-21. The improvement, however, was
12 temporary and plaintiff required another occipital nerve block in June 2015. *Id.* at
13 1379.

14 There was substantial evidence that plaintiff's left shoulder condition –
15 whether it was glenohumeral and/or acromiovacular osteoarthritis – and his
16 occipital neuralgia had more than a minimal effect on his ability to work and were
17 sufficient to pass the de minimis threshold of step two. Therefore, the ALJ erred at
18 step two. The ALJ's step two error may be harmless if the ALJ properly
19 considered the impairments in his RFC determination. *See Lewis v. Astrue*, 498
20 F.3d 909, 911 (9th Cir. 2007) (the failure to address an impairment at step two is
21 harmless if the RFC discussed it in step four). As discussed below, however, the
22 ALJ here did not properly consider the impairments in his RFC determination.

23 **C. The RFC Determination Was Not Supported by Substantial Evidence**

24 Plaintiff contends the RFC determination was not supported by substantial
25 evidence because it failed to incorporate any physical limitations and failed to
26 account for his moderate limitations in concentration, persistence, and pace. P.
27 Mem. at 18-22.

1 RFC is what one can “still do despite [his or her] limitations.” 20 C.F.R.
2 § 416.945(a)(1)-(2). The ALJ reaches an RFC determination by reviewing and
3 considering all of the relevant evidence, including non-severe impairments. *Id.*
4 Here, the ALJ determined plaintiff had the physical RFC to perform a full range of
5 work at all exertional levels and only had non-exertional limitations. AR at 31.
6 The ALJ limited plaintiff to simple, routine tasks; frequent contact with
7 supervisors, coworkers, and the public; and simple work related decisions. *Id.*

8 **1. Physical Impairments**

9 The ALJ was obligated to consider plaintiff’s shoulder pain and occipital
10 neuralgia, as well as other physical impairments, in assessing plaintiff’s RFC,
11 notwithstanding the ALJ’s failure to find them to be severe impairments. *See* SSR
12 96-8p (“In assessing RFC, the adjudicator must consider limitations and
13 restrictions imposed by all of an individual’s impairments, even those that are not
14 ‘severe.’”). In his RFC discussion, however, the ALJ made only scant mention of
15 plaintiff’s physical impairments. *See* AR at 31-34.

16 The only specific physical impairment considered was plaintiff’s vision
17 problem, which the ALJ determined could be addressed with spectacles. *Id.* at 33-
18 34. Otherwise, the ALJ relied on the March 2014 consultative examination in
19 which Dr. Celeste Emont found plaintiff has no physical functional limitations. *Id.*
20 at 34; *see id.* at 735. But as discussed above, and as the ALJ recognized, plaintiff
21 only began experiencing shoulder pain in June 2014, and was not diagnosed with
22 occipital neuralgia until August 2014. *Id.* at 29, 1177, 1358. These diagnoses and
23 the treatments for them discussed above all occurred after Dr. Emont’s
24 examination of plaintiff, and therefore could not have been considered by her. As
25 such, the ALJ’s complete reliance on Dr. Emont’s opinion to support a finding of
26 no physical limitations in plaintiff’s RFC reflects a complete failure by the ALJ to
27 consider plaintiff’s shoulder pain and occipital neuralgia in determining plaintiff’s
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1 RFC. This was error.

2 **2. Concentration, Persistence, and Pace**

3 At step three, the ALJ concluded plaintiff had moderate difficulties with
4 regard to concentration, persistence, or pace. *Id.* at 30. The ALJ appeared to reach
5 this conclusion based on plaintiff's reports of difficulty keeping up with the pace of
6 work in prior work and issues with following instructions. *See id.* Plaintiff
7 contends the ALJ's limitation of plaintiff to simple, routine tasks did not
8 adequately account for plaintiff's moderate limitations in concentration,
9 persistence, and pace. P. Mem. at 20-22.

10 Two Ninth Circuit cases provide guidance on this issue. In *Stubbs-*
11 *Danielson v. Astrue*, 539 F.3d 1169, 1173 (9th Cir. 2008), the Ninth Circuit held
12 that an ALJ's RFC limitation to simple, routine, repetitive work adequately
13 captured the claimant's deficiencies in pace because a physician opined plaintiff
14 had a slow pace, both in thinking and action, but was able to carry out simple tasks.
15 In other words, an "ALJ's assessment of a claimant adequately captures restrictions
16 related to concentration, persistence, or pace where the assessment is consistent
17 with restrictions identified in the medical testimony." *Id.* at 1174. By contrast, in
18 an unpublished decision one year later, *Brink v. Comm'r*, 343 Fed. Appx. 211, 212
19 (9th Cir. 2009), the Ninth Circuit held that the phrase "simple, repetitive work" did
20 not encompass plaintiff's difficulties with concentration, persistence or pace,
21 noting that the ALJ there failed to equate the two. This was clear from the ALJ's
22 hypotheticals in that case – he posed one referencing only the simple, repetitive
23 work limitation and another incorporating the additional limitation of moderate to
24 marked attention and concentration deficits. *Id.* The court found *Stubbs-*
25 *Danielson* distinguishable, as in *Stubbs-Danielson* the medical testimony did not
26 establish any limitation in concentration, persistence, or pace, whereas in *Brink* the
27 ALJ accepted that the claimant had difficulties with concentration, persistence, or
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1 pace. *Id.*

2 This case is more like *Brink*. The ALJ found plaintiff had moderate
3 difficulties with concentration, persistence, or pace, but did not include any such
4 limitation in the RFC. *See* AR at 30-31. Instead, the ALJ only included
5 restrictions to simple, routine tasks and simple work-related decisions. *See id.* at
6 31. There is nothing in the record to suggest these restrictions encompass the
7 limitations with concentration, persistence, and pace. The court finds *Brink*'s
8 reasoning is persuasive. Thus, under *Brink*, the ALJ erred because he did not
9 equate simple, routine tasks and simple work-related decisions with concentration,
10 persistence, and pace limitations.

11 Plaintiff further argues that as a consequence of the ALJ's failure to find
12 plaintiff's occipital neuralgia severe at step two and consider it in his RFC
13 determination, as discussed above, the ALJ also failed to add a further limitation of
14 low stress. *See* P. Mem. at 22. Plaintiff contends his physicians concluded stress
15 was a precipitating factor to his headaches. *See id.* On remand, the ALJ must also
16 consider the physician's findings about stress.

17 In sum, the ALJ's RFC determination was not supported by substantial
18 evidence.

19 **D. The ALJ's Step Five Determination Was Not Supported by Substantial**
20 **Evidence**

21 Plaintiff contends the ALJ's step five determination was not supported by
22 substantial evidence because it relied upon an erroneous RFC assessment. P. Mem.
23 at 22-23. The court agrees.

24 Indeed, because as discussed above the RFC did not sufficiently account for
25 plaintiff's physical impairments and difficulties with concentration, persistence,
26 and pace, the hypothetical posed to the vocational expert was incomplete. *See* AR
27 at 90-91. “If a vocational expert's hypothetical does not reflect all the claimant's
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1 limitations, then the expert's testimony has no evidentiary value to support a
2 finding that the claimant can perform jobs in the national economy.”” *Hill v.*
3 *Astrue*, 698 F.3d 1153, 1162 (9th Cir. 2012) (quoting *Matthews*, 10 F.3d at 681
4 (internal quotation marks and citation omitted); *see Edlund v. Massanari*, 253 F.3d
5 1152, 1160 (9th Cir. 2001) (same and citing additional authority)). The ALJ based
6 his step five finding on the vocational expert's testimony. AR at 35.
7 Consequently, in reaching an incomplete RFC determination, posing an incomplete
8 hypothetical to the vocational expert, and then relying on the vocational expert's
9 testimony, the ALJ erred at step five.

10 **V.**

11 **REMAND IS APPROPRIATE**

12 The decision whether to remand for further proceedings or reverse and
13 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
14 888 F.2d 599, 603 (9th Cir. 1989). It is appropriate for the court to exercise this
15 discretion to direct an immediate award of benefits where: “(1) the record has been
16 fully developed and further administrative proceedings would serve no useful
17 purpose; (2) the ALJ has failed to provide legally sufficient reasons for rejecting
18 evidence, whether claimant testimony or medical opinions; and (3) if the
19 improperly discredited evidence were credited as true, the ALJ would be required
20 to find the claimant disabled on remand.” *Garrison v. Colvin*, 759 F.3d 995, 1020
21 (9th Cir. 2014) (setting forth three-part credit-as-true standard for remanding with
22 instructions to calculate and award benefits). But where there are outstanding
23 issues that must be resolved before a determination can be made, or it is not clear
24 from the record that the ALJ would be required to find a plaintiff disabled if all the
25 evidence were properly evaluated, remand for further proceedings is appropriate.
26 *See Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*,
27 211 F.3d 1172, 1179-80 (9th Cir. 2000). In addition, the court must “remand for
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1 further proceedings when, even though all conditions of the credit-as-true rule are
2 satisfied, an evaluation of the record as a whole creates serious doubt that a
3 claimant is, in fact, disabled.” *Garrison*, 759 F.3d at 1021.

4 Here, remand is warranted because the ALJ erred at step two and failed to
5 properly consider all of plaintiff’s impairments and limitations in his RFC
6 determination. Remand is necessary to allow a reassessment of plaintiff’s RFC.
7 The court cannot say on this record whether the ALJ would be required to find
8 plaintiff disabled. On remand, the ALJ shall further develop the record if
9 necessary, revisit step two to determine which impairments are severe, reassess
10 plaintiff’s RFC, and proceed through steps four and five to determine what work, if
11 any, plaintiff is capable of performing.

12 **VI.**

13 **CONCLUSION**

14 IT IS THEREFORE ORDERED that Judgment shall be entered
15 REVERSING the decision of the Commissioner denying benefits, and
16 REMANDING the matter to the Commissioner for further administrative action
17 consistent with this decision.

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19 DATED: March 26, 2019

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SHERI PYM
United States Magistrate Judge